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February 7, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: MM Docket No. 94-131 and PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith for filing with the Commission are an original and five copies of "Reply Comments" in the above-referenced proceedings.

Should there by any questions concerning this matter, please communicate with this office.

Respectfully submitted,

William D. Wallace

cc: Barbara A. Kreisman
Sharon Bertelsen
Jerianne Timmerman

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Services and in the Instructional Television Fixed Service	)	MM Docket No. 94-131
	)	
and	)	
	)	
Implementation of Section 309(j) of the Communications Act Competitive Bidding	)	PP Docket No. 93-253

REPLY COMMENTS

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Dated: February 7, 1995

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To: The Commission

REPLY COMMENTS

I. SUMMARY

As the comments in this proceeding confirm, the development of the Multipoint Distribution Service ("MDS") remains stunted. After more than 10 years of licensing, all operational MDS systems serve a subscriber base of less than 2% of that of cable TV systems. Despite this admitted lack of progress, some commenters recommend that the Commission retain, and indeed entrench, the status quo for MDS by continuing to use the current site-by-site licensing procedure. Such an outcome would not serve the public interest in developing MDS, and would not accomplish the Commission's goal of adopting licensing

procedures which would promote the development of "wireless cable" as a genuine competitor to cable TV providers.

On the other hand, several commenters recognize the substantial benefits which may be reaped from adoption of the Commission's preferred approach of geographic license areas. Even MDS operators admit that licensing in broad geographic service areas would be appropriate when wireless cable digital technology develops in the next few years. Accordingly, the Commission should adopt the geographic licensing approach to promote the development of MDS and also adopt the recommendations offered in the comments to facilitate acquisition of channel capacity by existing wireless cable operators.

II. GEOGRAPHIC SERVICE AREAS FOR MDS BEST SERVE THE PUBLIC INTEREST; THE COMMENTS HAVE PROVIDED NO RATIONALE TO CONTINUE THE SITE-BY-SITE LICENSING PROCEDURE.

More than ten years have passed since the Commission first attempted to develop MDS. Yet, there is an existing subscriber base of less than a million, as estimated by the principal industry organization.[1] In other words, MDS has less than 2% of the subscriber base of incumbent cable TV systems.[2] Although

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[1] See Comments of Wireless Cable Association International, at 6-7 ("WCAI Comments"). The Coalition of Wireless Cable Operators ("CWCO") noted that one industry source reported that there were approximately 401,000 MDS subscribers at the end of 1993, and predicted that, by 2000, there would be about 2 million subscribers. CWCO Joint Comments, at 2 (citing The Kagan Wireless Cable Databook dated January 1994).

[2] As of January 1, 1994, the cable industry had approximately 55 million subscribers. 1994 TV/Cable Factbook, at F-2.

hundreds of licenses have been issued, the plain fact is that MDS has not, and apparently cannot, develop as an actual competitor to cable TV under the current licensing approach.[3]

While multiple factors undoubtedly have contributed to the state of the industry, the existing licensing approach has certainly not facilitated growth of MDS. The use of lotteries to award licenses in many instances may not have placed MDS construction permits into the hands of persons most interested in developing systems. Moreover, the current site-by-site licensing procedure has ensured a patchwork of license areas and licensees, chosen not on a community of interest basis, but rather the vagaries of transmitter placement by prior applicants. As a result, MDS systems have not been built, and have not developed into viable competitors for cable TV systems.

A change in the status quo is clearly warranted. As the Commission recognized in the NPRM, and as some commenters recognized, the use of broad, geographic license areas, particularly ADI's, would best serve the public interest by easing the administrative burdens of the current procedure and allowing license areas to be easily identified and licenses issued promptly.[4] The objections

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[3] At least one commenter reported that it was also faced with impending competition from Direct Broadcast Satellite systems. Comments of Sioux Valley Rural Television, at 2-3 ("SVRTV Comments").

[4] See Comments of Crowell & Moring, at 2-7 (recommending ADI licenses) ("C&M Comments"); Comments of Pacific Telesis Enhanced Services, at 2 (ADI's are "the appropriate geography" for assignment of new MDS licenses); Comments of CAI Wireless Systems, Inc., at 5 (recommending MSA's as license areas) ("CAI Comments"); Comments of The Rural Wireless Cable Coalition, at 9 (same).

in the comments to the geographic approach provide no valid rationale to deter the Commission from adopting this preferred approach.

A. The Service Characteristics of MDS Require That The National Window Licensing Model Be Rejected.

Some commenters recommend that the Commission use a national window approach.[5] As a rationale for this procedure, several commenters suggested that MDS transmissions are more like broadcast signals than cellular-based delivery services, and, therefore, the Commission should adopt the national window approach, on a site-by-site basis, similar to that used for LPTV.

This approach is flawed, however, because it fails to take into account the service characteristics of MDS and the significant differences between MDS and broadcast services. MDS is more like IVDS, LMDS, and SMR, for which the Commission has found the geographic approach best serves the public interest.[6] Using the national window licensing procedure for MDS would ignore fundamental differences between MDS and broadcast services.

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[5] See CWCO Joint Comments, at 10-13; Comments of Hardin & Associates, at 4, 7-9 ("Hardin Comments"); Comments of United States Wireless Cable, Inc. at 3 ("USWC Comments"); Comments of Heartland Wireless Communications, Inc., at 5-6 ("Heartland Comments"); WCAI Comments, at 41-42.

[6] See C&M Comments, at 3-5; Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Service, 7 FCC Rcd 1630, recon., 7 FCC Rcd 4923 (1992); Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557 (1993); Implementation of Sections 3(n) and 332 of the Communications Act, 76 RR 2d 326 at ¶¶ 84-99 (1994) (discussing SMR).

First, unlike commercial radio and television services, but like IVDS, LMDS, and SMR, MDS is a subscriber-based service. Radio and TV stations depend in large part upon advertising revenues for financing, which, in turn, depend upon the station's coverage pattern and the popularity of its programming decisions. On the other hand, financing an MDS station depends primarily on the number of subscribers that operator is able to attract. In this respect, access to a larger, geographic area in which to develop a subscriber base provides an MDS operator with an enhanced opportunity to succeed. Under the Commission's current approach -- as commenters recognized[7] -- much of a 15-mile service area may be useless unless it includes areas with potential subscribers. Residential areas do not necessarily develop in circles around the best transmitter site. With a larger service area and the use of strategic placement of transmitters, signal boosters and beam benders, an MDS licensee would be able to adjust its signal to meet subscriber needs.

Moreover, the LPTV licensing model is particularly inappropriate for MDS because the Commission is not attempting to develop LPTV as a competitive service to broadcast TV; rather, LPTV provides ancillary service to full power TV stations. In contrast, the Commission's goal for MDS is to make wireless cable a competitor for incumbent cable TV systems. And, MDS is seriously behind.

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[7] See WCAI Comments, at 18 (reporting on survey which indicated that 50% of wireless cable subscribers were outside 15-mile radius).

To develop the competitive character of MDS, the Commission needs a quick and efficient licensing procedure. As the Commission has already determined, the geographic approach facilitates maximizing competition and application processing.[8] Accordingly, to ease administrative burdens and facilitate the rapid build-out of MDS, the Commission should adopt its geographic licensing approach, preferably using ADI's.

B. Other Objections to Broad Geographic License Areas for MDS Also Raise No Valid Rationale to Retain the Current Licensing Procedure.

Other objections to the geographic approach similarly fail to provide any sound basis for not adopting the Commission's preferred approach. Some commenters suggest that it is too late to change the procedure for licensing MDS stations, particularly because the geographic approach is allegedly inconsistent with the existing site-by-site approach.[9] But, this is not the first time that the Commission has proposed a transition from one licensing procedure to another. For the Specialized Mobile Radio Service, the Commission recently determined that it was in the public interest to adopt a geographic approach based on competitive concerns, noting that SMR licensees "face significant competitive obstacles because channel assignment is on a station-by-station, channel-by-

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[8] See LMDS NPRM, 8 FCC Rcd at 562; IVDS Order, 7 FCC Rcd at 1638.

[9] See, e.g., Comments of American Telecasting, Inc., at 17-18 ("ATI Comments"); Heartland Comments, at 4; Comments of Mitchell Communications Corp., at 2.

channel basis."[10] Incumbent cable TV systems are given franchises in specific geographic areas and are increasingly "clustering" contiguous systems in order concentrate their subscriber base. If wireless cable systems are to become competitors, at a minimum, they should have the opportunity to provide service over an area which encompasses a large subscriber base. As with SMR, adoption of a geographic licensing approach would eliminate the restrictions associated with the static, site-by-site licensing procedure.

Some commenters also claimed that the Commission should reject the geographic approach because MSA's and ADI's do not match boundaries developed by the actual experience of wireless cable operators; ADI's may be too big, MSA's may be too small.[11] However, no radio transmitter signals "recognize" service area boundaries whether those boundaries are set at MSA's, ADI's or the current 15-mile radius from an MDS transmitter. The boundary is selected to provide a reasonable area in which to authorize service by a single operator. For the reasons discussed above, it makes more sense to provide MDS operators with geographic boundaries than signal boundaries because of the need for MDS stations to reach as many subscribers as possible in order to become an actual competitor to cable TV systems.

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[10] Implementation of Sections 3(n) and 332 of the Communications Act, 76 RR 2d 326, 356, at ¶ 85 (1994).

[11] See ATI Comments, at 18; CWCO Joint Comments, at 6-7; Heartland Comments, at 4; WCAI Comments, at 34-37.

The Commission's preferred approach was also criticized on the ground that digital MDS technologies, which would allow MDS stations to be more like cellular stations, may not be widely available.[12] Yet these comments also admit that such technology will be available in as little as two years.[13] It would make no sense for the Commission to adopt rules for a site-by-site approach, when such rules may soon be outmoded. Yesterday's technology should not control today's rules and tomorrow's competitor to cable TV. In any event, by adopting the geographic approach, the Commission may help to spur the oft-promised development of digital MDS technologies as the need for the technology increases. Use of such technology by existing operators would lead to more efficient use of spectrum and an increase in channel capacity which both the Commission and the MDS interests desire.

C. The Commission Should Ensure That Any Expansion of Existing Service Areas Facilitates Development of Operating Systems and Does Not Result in Warehousing of MDS Frequencies.

Some parties recommend that the Commission not only retain the current site-by-site licensing approach, but also expand the protected service areas of all

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[12] See WCAI Comments, at 39-40.

[13] WCAI suggested that compression technology would be available during 1996. Id. at 4; see also Notice of Proposed Rule Making, 8 FCC Rcd 2828, 2831 (1993) (proposing channel-loading for ITFS stations on a temporary basis for three to five years until compression technology is available). DBS providers are already using digital technologies to deliver video services to consumers.

existing licensees.[14] However, without regard to the merits of expanding service areas generally, the Commission should take great care to avoid creating a situation whereby MDS frequencies are warehoused by licensees which have not built authorized MDS stations and have no immediate plans to do so. Granting an expanded service area to such licensees would make it more difficult for operating systems to provide service in a market because of the increased protected areas for all. Reducing the unlicensed service areas may also reduce the value associated with any license for "useable channels" in a market.

In any event, adopting such an approach could undermine the Commission's objective of promoting widespread development of MDS. Accordingly, if the Commission adopts this proposal, then it should craft an appropriate standard to ensure any expansion permits improvement in actual MDS service by an operating system, rather than merely allowing a system that is unbuilt and has no immediate plans to do so to warehouse additional spectrum.

III. THE COMMENTS POINT OUT THE NEED TO ADAPT THE LICENSING PROCEDURE TO FIT THE NEEDS FOR DEVELOPMENT OF MDS.

In addition to adoption of geographic service areas, the Commission should adopt proposals which would make it easier for operating systems to aggregate channels.

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[14] See ATI Comments, at 3; CWCO Joint Comments, at 3-5.

Protected Service Area. While commenters recognized that the protected service area for MDS should be consistent with the area of license,[15] some expressed concern that it would be difficult for existing operators to coordinate operations with licensees of MSA or ADI service areas. However, whether the technology used is analog or digital, whether the protected area is 15 miles or an ADI, the new licensee and existing operators must coordinate operations. This is the current basis for establishing MDS facilities and would be under the geographic approach as well. The Commission should ensure that the protected service area of a licensed MDS station is co-extensive with its service area in order to provide an incentive to invest in a system which provides service broadly in the licensed service area.

First Auction. There was near universal support among the commenters for the Commission's proposal to give existing MDS operators the first opportunity to obtain unused licenses.[16] The commenters recognized that this would serve the public interest by allowing actual operators to expand their systems, thereby improve the ability of existing wireless cable systems to compete with incumbent cable TV systems. Such a system should be adopted.

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[15] See C&M Comments, at 7-8; CAI Comments, at 7; Pacific Telesis Comments, at 3.

[16] See C&M Comments, at 10-12; ATI Comments, at 12-13; CWCO Joint Comments, at 13-15; Heartland Comments, at 6; SVRTV Comments, at 1-2, 3-4; USWC Comments, at 4-5; WCAI Comments, at 26-33.

Dark MDS Stations. Some commenters pointed out that one of the principal impediments to development of a competitive wireless cable industry are unbuilt and/or nonoperational MDS systems.[17] Unless the Commission takes action on this issue, in some communities there would be little opportunity for initiation of a competitive MDS system. Accordingly, the Commission should require existing licenses with unbuilt facilities to demonstrate that they have concrete plans to become operational by a date certain. Such demonstration should be made before the first round of auctions. If no such demonstration were made, then these unbuilt facilities should be deemed "useable channels" subject to auction in a specific license area.

ITFS Frequencies. The Commission should provide lessees of ITFS frequencies an opportunity for the same protected service area during leased airtime as an MDS licensee.[18] The Commission's goal is to allow wireless cable operators to amass sufficient capacity to provide a competitive service. Because ITFS frequencies are a part of the useable channels, wireless cable operators should have the opportunity to extend their programming throughout the licensed area on both MDS and leased ITFS frequencies.

Engineering Geographic Service Areas. The Commission should not require a "long form" application for geographic service areas to include all

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[17] See Hardin Comments, at 9-10; USWC Comments, at 2, 7-9.

[18] See C&M Comments, at 9-10; Comments of Caritas Telecommunications, at 2.

eventual transmitter sites. An ADI licensee should be able to engineer its facilities in the most efficient and effective manner, subject to interference protection standards.[19]

IV. THE COMMISSION SHOULD DEFINE "USEABLE CHANNEL."

The WCAI raised a critical question regarding what is included in the "useable channels" in a market.[20] The Commission should define more clearly the rights represented in a license subject to auction, including, for example:

a. The right to provide service on all MDS channels and receive protection at all areas within an ADI, outside the interference protection boundaries for existing licensees.

b. The right to provide service on all MDS channels that become available as a result of revocation of existing permits and licenses for unbuilt MDS stations.

c. The right to provide service on all ITFS channels within the ADI, subject to interference protection for receive sites of existing licensees and permittees. (Providing service on unlicensed ITFS channels could be deemed a secondary use, which would not preclude establishment of ITFS receive sites.)

d. The residual right to all frequencies which become available for a specific period of time through revocation of licenses for unbuilt facilities.

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[19] See C&M Comments, at 8-9; Pacific Telesis Comments, at 2-3.

[20] See WCAI Comments, at 37-39.

By adopting such a definition, the Commission can inject more value into the auctioned licenses, and help to avoid disputes over rights to use frequencies and to promote widespread development of MDS.

V. CONCLUSION

The Commission is to be commended for taking a hard look at the processing rules for MDS and proposing a complete revision to the current cumbersome and out-dated system. The Commission should adopt its proposal to license MDS channels in broad, geographic service areas, preferably ADI's, and should also adopt rules which would facilitate the introduction of this new, critically needed licensing system, as described above.

Respectfully submitted,

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